PP

v.

MOGAN AYAVOO

HIGH COURT MALAYA, IPOH
BALIA YUSOF WAHI JC
[CRIMINAL TRIAL NO: 45-24-2001]
8 MARCH 2004

EVIDENCE: *Best evidence - Exceptions - Onus on prosecution - Evidence Act 1950, s. 32*

EVIDENCE: *Hearsay - Statement by person whose attendance cannot be procured - Failure to show diligent and exertive attempts to procure attendance of witness - Whether fatal to prosecution's attempt to invoke s. 32 of Evidence Act 1950*

EVIDENCE: *Hearsay - Exceptions - Evidence Act 1950, s. 32 - Conditions for reception of evidence against hearsay rule*

EVIDENCE: *Statement - Cautioned statement - Voluntariness - Whether onus on accused to show involuntariness - Whether necessary for defence to establish conclusively that there was inducement or threat*

EVIDENCE: *Confession - Conviction may be based on - Whether sufficient corroboration found*

EVIDENCE: *Standard of proof - Proof beyond reasonable doubt - Nature of - Whether mere denial by accused sufficient to dislodge prosecution's proof beyond reasonable doubt*

The accused was charged with murder. The prosecution's case rested mainly on two pieces of evidence namely a s. 112 CPC statement made by one Rubin bin Jaibit ('Rubin's statement') and the cautioned statement of the accused ('P10'), recorded by one Chief Inspector Balakrishnan ('SP10'). The prosecution sought to admit Rubin's statement through s. 32 of the Evidence Act 1950 on the basis that Rubin could not be found or that his attendance could not be procured within the meaning of s. 32(1) of the Evidence Act 1950. Evidence was led to show that Rubin was missing and that attempts were made to find him. The evidence revealed that in order to locate Rubin, the police had placed advertisements in the newspapers, sent out signals to all Ketua Polis Daerah in East and West Malaysia, and traced all known addresses of Rubin. All such efforts were futile. With regard to the cautioned statement, the defence alleged

that it was involuntarily made as the accused was assaulted and threatened by the police into making the statement and that he was promised he would be released from detention if he confessed to the crime. A trial within a trial however established that the statement was voluntarily made. The court, upon a finding that the prosecution had made out a *prima facie* case against the accused, called upon him to enter his defence. The accused chose to make a statement from the dock.

Held (finding the accused guilty as charged and sentencing him to death):

[1] Rubin's statement was indeed a statement made under s. 112 of the CPC and thus fell within the meaning of s. 32(1)(i) and (j) of the Evidence Act 1950. It is a fundamental rule of evidence that the best evidence available must be adduced in court. If anything less than the best is to be used, as in the instant case, where resort is made to s. 32 EA, the onus is on the prosecution to satisfy the court that the circumstances fall strictly within the section. *PP v. Lam Peng Hwa* [1996] 5 MLJ 405 (foll); *PP v. Mohamad Said* [1984] 1 MLJ 50 (foll). (p 631 f-g)

[2] In the instant case, the attempts made by the police were nothing more than sticking to their own routine procedure. The witness (Rubin), a key person in their case, was at one time a suspect in the case and had jumped police bail. These were factors within the knowledge of the prosecution and as such diligent and exertive attempts must be shown to have been made to procure the witness. The failure of the police to locate any member of Rubin's family and to interview them as well as the failure to Rubin's Sabah address clearly indicated the lack of initiative and diligence on their part. This was detrimental to the prosecution's attempt in seeking the aid of s. 32 of the Evidence Act 1950. The High Court had to have regard to the fact that stringent conditions had to be imposed for the reception of evidence against the hearsay rule and also to the fact that the accused in the instant case was facing a capital charge. In the instant case, the prosecution had failed to meet the requirements and prerequisites of s. 32 of the Evidence Act 1950. *PP v Chow Kaw Meng* [2001] 7 CLJ 387 (refd). (p 633 b-c, g)

[3] There was no onus on the accused to show involuntariness in the making of the cautioned statement but for the prosecution to prove beyond reasonable doubt that it was made voluntarily. (*Hasibullah Mohd Ghazali v. PP* [1993] 4 CLJ 535 (refd); *PP v. Tay Bee Seng* [1993] 1 CLJ 526 (refd); *Chan Ming Cheng v. PP* [2002] 4 CLJ 77 (refd)). It was also not necessary for the defence to establish conclusively that there was inducement

or threat. It was sufficient if the circumstances afforded reasonable grounds for believing that there was such a threat or inducement. Such inference might be suggested by the evidence produced by the accused or the surrounding circumstances which the High Court found none in the instant case (see *PP v. Aris Yunus* [1989] 1 CLJ 239 (refd)). In the instant case, the High Court was satisfied beyond reasonable doubt that the prosecution had proved the cautioned statement of the accused person to have been voluntarily made and hence the statement was admitted as evidence (*Juraimi Husin v. PP* [1998] 2 CLJ 383 (foll); *Francis Anthonysamy v. PP* [2003] 1 CLJ 831 (foll)). (p 639 a & e)

[4] The High Court, having sieved through the cautioned statement of the accused and the other evidence of the prosecution, found sufficient corroboration of the matters stated therein. The High Court had further cautioned itself that confessions are not always true and that they must be checked in the light of the whole evidence on record to see whether such confession can carry a conviction. (*PP v. Chong Boo See* [1988] 1 CLJ 679; [1988] 2 CLJ (Rep) 206 (foll); *PP v. Lai Peng Yuen & Ors* [1968] 1 MLJ 12 (foll); *Sandra Margaret Birch v. PP* [1978] 2 MLJ 72 (foll).) On the totality of the evidence, the prosecution had established a *prima facie* case against the accused and accordingly the accused was called to make his defence. (pp 640 g & 642 f)

[5] Having considered carefully the story of the accused given from the dock, the High Court found that the defence had failed to cast any doubt on the prosecution's case. It was not for the defence to prove anything and all that was required of it was to tender an explanation that was reasonable and probable and which cast a doubt either as to the truth of the prosecution's case or as to the guilt of the accused. (*Mohd Yusof Hj Ahmed v. PP* [1963] 2 MLJ 167 (foll)). A reasonable doubt must be a doubt arising from the evidence or want of evidence and cannot be an imaginary doubt or conjecture unrelated to evidence (*PP v. Saimin & Ors* [1971] 1 MLJ 16 (foll). Proof beyond reasonable doubt does not mean proof beyond the shadow of a doubt. It need not reach certainty but it must carry a high degree of probability (*Liew Kaling & Ors v. PP* [1960] MLJ 306 (foll)). The accused's statement from the dock was more of a bare denial of the whole episode. A mere denial without other proof to reasonably dislodge the prosecution evidence is not sufficient. (*PP v. Ling Tee Huah* [1982] 2 MLJ 124 (foll); *PP v. Ku Lip See* [1981] 1 MLJ 258 (foll); *PR*

v. Amran Ismail [1992] 2 CLJ 787 (foll).) On the whole the accused was not a witness of truth and his story had not cast a reasonable doubt on the prosecution's case. (pp 644 d & 645 c-d)

Case(s) referred to:
Aidil Manaf v. PP [1992] 2 CLJ 1239; [1992] 3 CLJ (Rep) 317 HC ***(refd)***
Chan Ming Cheng v. PP [2002] 4 CLJ 77 CA ***(refd)***
Francis Anthonysamy v. PP [2003] 1 CLJ 831 CA ***(refd)***
Hasibullah Mohd Ghazali v. PP [1993] 4 CLJ 535 SC ***(refd)***
Juraimi Husin v. PP [1998] 2 CLJ 383 CA ***(foll)***
Liew Kaling & Ors v. PP [1960] 26 MLJ 306 ***(foll)***
Mohamad Salleh v. PP [1969] 1 MLJ 104 ***(refd)***
Mohamed Yusof Ahmad v. PP [1980] 1 LNS 220 ***(foll)***
Pang Chee Meng v. PP [1992] 1 CLJ 39; [1992] 1 CLJ (Rep) 137 SC ***(refd)***
PP lwn. Amran Ismail [1992] 2 CLJ 787; [1992] 1 CLJ (Rep) 558 HC ***(refd)***
PP v. Aris Yunus [1989] 1 CLJ 239; [1989] 2 CLJ (Rep) 289 HC ***(refd)***
PP v. Chin Yoke [1940] MLJ 47 ***(refd)***
PP v. Chong Boo See [1988] 1 CLJ 679; [1988] 2 CLJ (Rep) 206 HC ***(foll)***
PP v. Chow Kam Meng [2001] 7 CLJ 387 HC ***(refd)***
PP v. Dato' Seri Anuar Ibrahim (No 3) [1999] 2 CLJ 215 HC ***(refd)***
PP v. Ku Lip See [1981] 1 MLJ 258 ***(foll)***
PP v. Lai Peng Yuen & Ors [1968] 1 MLJ 12 ***(foll)***
PP v. Ling Tee Huah [1982] 2 MLJ 124 ***(foll)***
PP v. Lam Peng Hwa & Anor [1996] 5 MLJ 405 ***(refd)***
PP v. Mohamad Said [1984] 1 MLJ 50 ***(foll)***
PP v. Mohd Fuzi Wan Teh [1989] 2 CLJ 652; [1989] 2 CLJ (Rep) 341 HC ***(refd)***
PP v. Saare Hama & Anor [2001] 4 CLJ 475 HC ***(refd)***
PP v. Saimin & Ors [1971] 1 MLJ 16 ***(foll)***
PP v. Tay Bee Seng [1993] 1 CLJ 526 HC ***(refd)***
Sandra Margaret v. PP [1978] 2 MLJ 72 ***(refd)***
Tan Boon Kean v. PP [1995] 4 CLJ 456 FC ***(refd)***

Legislation referred to:
Criminal Procedure Code, ss. 112, 113
Evidence Act 1950, s. 32

For the prosecution - Abdul Rahim Mohd Noor (Shahidani Abd Aziz)
For the accused - Terence Naidu; M/s WK Kok & Co
Pardeep Singh; M/s Pardeep Singh & Co

Reported by Andrew Christopher Simon

JUDGMENT

Balia Yusof Wahi JC:

The accused in this case was charged as follows:

> Bahawa kamu pada 12.8.2000, di antara jam 8.30 malam hingga 10.00 malam di dalam kebun kelapa sawit, di tepi Taman Pelangi, Langkap, di dalam Daerah Hilir Perak, di dalam Negeri Perak, telah melakukan pembunuhan dengan menyebabkan kematian Shamsul bin Arbain, K/P: 730309-08-5933, dan oleh yang demikian kamu telah melakukan suatu kesalahan yang boleh di hukum di bawah Seksyen 302 Kanun Keseksaan.

Another accused person by the name of Saravanan a/l Ayavoo who is the brother of the accused was also charged for the same offence in case No. PCT.45-03-02. An application was made for the above two cases to be heard jointly and accordingly the two cases were so heard for which the accused Saravanan a/l Ayavoo in case No. PCT. 45-03-02 was acquitted and discharged without his defence being called at the close of the prosecution case.

The evidence adduced by the prosecution were as follows: On 14 August 2000 SP1 who was on duty at the enquiry office Balai Polis Langkap received a telephone call from an unknown person regarding the discovery of a corpse in an oil palm estate. A police party was sent to the scene and recovered a naked body of a male with maggot all over the body. The body was subsequently sent to the Teluk Intan Hospital Mortuary where a post mortem was done on 16 August 2000 by SP4. The cause of death according to SP4 was the injury to the carotid artery which results in the loss of blood. The said injury was likely to be caused by a sharp object. SP4 testified there were 14 injuries altogether on the body comprising of stab wounds, slash wound and scratches. The injuries were mostly on the neck of the deceased.

In proving the identity of the deceased, the prosecution called three witnesses namely SP6, SP8 and SP9. SP6; the father of the deceased testified that he identified the body to be that of his son from the teeth and the build where he stated:

> Mayat tak boleh cam sebab hitam tetapi bentuk badan dan tanda gigi atas kiri berlapis. Di sebelah atas gigi itu pecah.

From the evidence of SP8, an officer from the Pusat Pendaftaran Jenayah Bukit Aman, the prosecution sought to establish the identity of the deceased from the thumb print, obtained from the deceased and comparing it with the thumb print on the deceased's identity card. Using the AFIS (Automated Fingerprint Identification System) computer analysis and comparison of the thumb prints, SP8 concludes that the identity of the deceased was that of Shamsul b. Arbain.

SP9, an officer from the Jabatan Pendaftaran Negara, Batu Gajah testified that on 29 August 2000 one ASP Suhaimi (SP14) the investigating officer of this case came to his office requesting him to do a comparison on the thumb print which he brought along with him and to see whether it matches with the thumb print on the identity card of the deceased. Upon scanning it and using the AFIS system SP9 testified that the thumb print matches, indicating that they belong to the deceased.

The prosecution sought to invoke the provision of s. 32 of the Evidence Act by introducing through SP11 a statement made under s. 112 of the Criminal Procedure Code. The said statement which was recorded by SP11 belonged to a witness by the name of Rubin bin Jaibit who is now missing and could not be traced. SP11 testified that on 9 September 2000 he recorded a statement from Rubin bin Jaibit under s. 112 of the Criminal Procedure Code at Balai Polis Langkap. According to SP11 he did so on the instruction of ASP Suhaimi (SP14). Altogether the statement comprises of 9 pages and SP11 only recorded the first three pages of the statement which he signed and countersigned by the said witness. In his testimony SP11 states that the statement he recorded from the witness was pertaining to a murder case. The prosecution sought to introduce the statement and on the objection of the defence, the statement was marked only as ID12. Other witnesses were called by the prosecution namely SP12 and SP13 to prove that the said Rubin bin Jaibit cannot be found or whose attendance cannot be procured within the meaning of s. 32(1) of the Evidence Act 1950. SP12, Inspector Lim Chee Jiun who is attached to the Cawangan Siasatan Jenayah Daerah Hilir Perak took over the investigation of this case from SP14 when the latter went on transfer to Alor Star, Kedah. In his testimony, this witness stated that he placed an advertisement in Utusan Malaysia and the Chinese newspaper of Sin Chew on 17 June 2003 produced as exhs. P13 and P14 respectively. He also stated that signals were sent to all Ketua Polis Daerah requesting them to help trace the whereabouts of Rubin bin Jaibit. The same was also done to all Ketua Polis Daerah in Sabah. None of the Ketua Polis Daerah responded to the signals.

SP13, DSP Arjunaidi bin Mohamed is the Head of the Criminal Investigation Department Hilir Perak and was the officer in charge of the overall criminal investigation in the district. He supervised the investigation of this case and in essence he corroborates the evidence of SP12 in respect of the attempts made by SP12 in sending the signals to all the Ketua Polis Daerah both in Semenanjung and also in Sabah and Sarawak. This witness further confirms that attempts were also made to trace the said witness at the addresses in Kelang and Langkap as well as the old address in Sabah.

When SP14 (ASP Suhaimi), the investigating officer gave evidence, he stated that Rubin bin Jaibit was arrested by the police on 10 September 2000 and was subsequently released on police bail for one month after which he was required to present himself at the Teluk Intan Police Station. On 27 September 2000, SP14 proceeded to record further statement from the said Rubin bin Jaibit under s. 112 of the Criminal Procedure Code in continuation of his statement which was earlier recorded by SP11 on 9 September 2000. According to SP14, Rubin bin Jaibit stated in the statement to the police that he knew and saw what happened at the scene of the crime where the accused stood charged in this case.

The defence objected to the evidence given by SP14 in respect of the statement given by Rubin bin Jaibit on the ground that it breaches the hearsay rule. The prosecution contended that the requirement of s. 32(1)(i) of the Evidence Act 1950 has been met and all the prerequisites to the application of that provision has been satisfied through the evidence given by the recording officer SP11, and the evidence of SP12, SP13 and SP14. Exhibits P13-P22 relate to the attempts made by the prosecution to trace the said Rubin bin Jaibit in seeking the aid of s. 32(1)(i) of the Evidence Act 1950 for the admission of the s. 112 statement.

In the light of this, the court has now to decide on the admissibility of ID12 and for that purpose both parties were invited to submit on the issue. The prosecution contends that the witness is untraceable. Signals has been sent out by the police to all the Ketua Polis Daerah throughout the country and enquiries has been made at the Jabatan Pendaftaran Negara with regard to the witness latest address. Advertisements both in the Malay and Chinese newspapers has been placed on 17 June 2003 notwithstanding the fact the effort were also made by the Teluk Intan Police to look for the witness at the known addresses in Langkap and his place of work.

For the defence, it was submitted that the prosecution has not shown enough efforts has been made to track down the witness. It is incumbent on the prosecution to prove that the said witness could not be found or whose attendance cannot be procured and that no efforts were made to make use ss. 34 and 35 of the Criminal Procedure Code which is relevant to procure the attendance of witnesses and a useful tool in police investigations. There has been no attempt to interview the family members of the witness as well as the other occupants of the house and also his colleagues at his work place. Attempts to trace the said witness was made at the last minute after the trial has started and although signals were sent out throughout the country, it has never been satisfactorily proved whether any of the police district ever acted or respond to the same and thus doubting its efficacy and usefulness.

After having heard the submission of both parties, I ruled that the statement in ID12 is not admissible as an exhibit for the reason which I now set out.

From the very start, the said witness Rubin b. Jaibit whom the prosecution believe is a material witness to this crime was put under police bond to ensure his attendance at the Balai Polis Langkap. He presented himself twice and absconded subsequently after that. Nothing was done to trace him after that until 6 August 2002 a day after this trial has started. In the course of giving evidence, various addresses of the witness were given and exh. P15 which is the ID of the personnel who attempted to serve the subpoena shows that attempts were made to locate the witness at the various addresses but not at the address as stated in the subpoena itself. Exhibit P15 shows attempts being made at No. 13 J Jalan Kilang Padi Lama Langkap and at his place of work at Batu 3 1/2 Jalan Changkat Jong, Telok Intan and also at 13 B Jalan Kilang Padi Lama Langkap. No attempt however was made at F 14 Kampung Baru Langkap, which is the address stated in the subpoena. Exhibit P15 is silent on this. As the same time the maker of exh. P15, one Detective L/Kpl Mohd. Noh was never called by the prosecution to give evidence and explain the matter. It is further noted that all these attempts were made during the progress of the trial.

It is known to the prosecution that this witness hails from Sabah and that explains the reason why police signals were sent to all Ketua Polis Daerah both in West and East Malaysia. Exhibits D17, P18, P19 and P22 are such police signals sent on 14 June 2003, 30 August 2002, 13 June 2003 and 6 August 2002 to the various Ketua Polis Daerah. The Ketua Polis Daerah Hilir Perak who sent these signals did not receive any response from any of the Ketua Polis Daerah in respect of any of these signals although the signal categorically stated that a reply was required. Be that as it may, neither the investigating officer nor any of the officer at the Teluk Intan Police Station gave any regard to this. The prosecution has also introduced evidence that advertisements were made in the Malay daily, Utusan Malaysia on 17 June 2003 and 10 September 2002, as in exhs. P13 and P20 respectively and in the Chinese daily, Sin Chew on 17 June 2003 and 30 February 2002, as in exhs. P14 and P21. The evidence of SP12 who took over the investigation of this case demonstrates the lack of initiative on the part of the prosecution to show that serious efforts have been made to trace the witness. SP12 not only does not know when the trial starts but also admits that he does not know anything about subpoenas for the case. He never carried out investigation with the Immigration Department in respect of the witness address and was also not in a position to say whether the Sabah Police made any attempt to trace the witness at the address given in the police signals. The cavalier attitude of

the investigating officer of the case in the handling of this issue results in the prosecution falling short of meeting the prerequisites of s. 32 of the Evidence Act.

To be admissible under s. 32 of the Evidence Act, it is incumbent upon the prosecution that all the requirements are met. Section 32 is an exception to the general rule that hearsay evidence is not admissible. The circumstances under which a statement becomes admissible are set out in the various paragraphs of that section and in this case the prosecution is relying on the provision of paras. (i) and (j) which provide as follows:

> 32(1) Statements, written or verbal, of relevant fact made by a person who is dead or who cannot be found, or who has become incapable of giving evidence, or whose attendance cannot be procured without an amount of delay or expense which under the circumstance of the case appears to the court unreasonable, are themselves relevant facts in the following cases:
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> a) ...
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> b) ...
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> c) ...
>
> (i) When the statement was made in the course of, or for the purpose of, an investigation or inquiry into an offence under or by virtue of any written law; and
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> (j) When the statements were made by a public officer in the discharge of his duties.

This is no question that the statement recorded by SP11 and SP14 is made under s. 112 of the Criminal Procedure Code. SP11 recorded the statement on 9 September 2000 while SP14 continued to record a further statement on 29 September 2000. This statement falls within the meaning of s. 32 1(i) and (j) of the Evidence Act. It is a fundamental rule of evidence that the best evidence available must be adduced in court. If anything less than the best is to be used, as in this case where resort is made to s. 32 of the Evidence Act, the onus is on the prosecution to satisfy the court that the circumstances fall strictly within the section.

In *Public Prosecutor v. Lam Peng Hwa & Anor* [1996] 5 MLJ 405, Kang Hwee Gee J stated as follows at p. 413:

a It was held in the Federal Court case of *Sim Tiew Bee v. PP* [1973] 2 MLJ 200 that before the court could admit the statement of a witness as evidence under s. 32 of the Evidence Act, the condition precedent contemplated under the section must be satisfied. The condition precedent that the prosecution ought to satisfy in the present case was either to prove that the witness could not be found or that her attendance could not be procured, without an amount b of delay or expense. The learned authors of *Sarkar's Law of Evidence* (14th Ed) at p 649 state (relying on Indian authorities) that where no diligent search and reasonable exertion were made to procure the witness, the court could not come to a finding that the witness could not be found and therefore his statement could not be admitted under the section. Mere ignorance of the whereabouts of the witness is not sufficient to invoke the section. As the c interpretation appears to be somewhat sound, I will, for the present case, adopt their view. It stands to reason that unless stringent conditions are prescribed and fulfilled, the established rule against the reception of hearsay evidence would be eroded; courts would have to accept as evidence statements which may not stand the vigours of cross-examination had the maker been called to d give evidence.

In *PP v. Mohamad Said* [1984] 1 MLJ 50, Mohamd Azmi J (as he then was) observed, at p. 51:

If a particular witness is material to the prosecution's case, it is the duty of e the police to keep track of his whereabouts and take all precautionary measures that they be informed of any change of address. Under s. 34(ii) of the CPC, the responsibility of serving summonses or subpoenas on the accused persons and witnesses is with police officers, unless the court otherwise directs. If a particular witness is very material to the prosecution's case, it stands to reason that the police must exercise extra diligence in applying for summonses early f and in taking all necessary steps to ensure that the correct address of the witness has been obtained, bearing in mind the unreliability nowadays of the addresses given on identity cards. The correct addresses of the material witnesses should be obtained at the first opportunity and, if necessary, the police can invoke ss. 111 and 112 of the CPC at the investigation stage. Section 111 of the CPC empowers the police to require their attendance at g the police station so that they can be questioned under s. 112 of the CPC. If they do not attend, then under sub-s. (ii) of s. 111, they may be compelled to attend by a magistrate (see *Chong Fook Kam & Anor v. Shaaban & Ors* [1968] 2 MLJ 50 at p. 54). Where the person to be summoned cannot by the exercise of due diligence be found, then under s. 35(iv) of the CPC, the summons may be served by leaving a copy thereof for him with some adult h member of his family or with his servant residing with him. If service under s. 35(iv) of the CPC cannot be effected, then the prosecution should invoke s. 36 of the CPC, by affixing a copy of the summons to some conspicuous part of the house or other place in which the person summoned ordinarily

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> resides, if so directed by the court. When a witness fails to appear in court after being served under ss. 35 or 36 of the CPC, the prosecution is then entitled to apply for warrant of arrest under s. 47 of the CPC. In the present case, it would appear that none of these powers given by the CPC to compel the appearances of the two material witnesses had been exhausted by the police, either in the first or second prosecution.

Having considered the whole facts and circumstances of the case before me, I am of the view that the attempts made by the police in this case are nothing more than sticking to their known routine procedure. It is high time that the effectiveness of the police signals and the advertisements in the local dailies be re examined by the police in their investigation process. The witness is a key person to their case, he was at one time a suspect in the case and has jumped the police bail. These are factors that are within the knowledge of the prosecution and as such diligent and exertive attempt must be shown to have been made to procure this witness. The failure of the police to locate any member of the family of the witness and to interview them and for that matter to check on the address known to them in Sabah clearly indicate the lack of initiative and diligence on their part. This is detrimental to the prosecution's attempt in seeking the aid of s. 32 of the Evidence Act. This court must have regard to the fact that stringent conditions must be imposed for the reception of evidence against the hearsay rule and also to the fact that the accused here is facing a capital charge. As observed by Abdul Wahab Patail J in *PP v. Chow Kam Meng* [2001] 7 CLJ 387 at p. 398:

> That he cannot be found or his attendance cannot be procured without an amount of delay or expense which under the circumstances of the case appears to the court to be unreasonable, places a further and important qualification. Not much effort to find and procure attendance is warranted in a minor case. In a trial involving a possible death penalty, a more serious effort is warranted.

In the circumstances , I hold that on the evidence presented before the court, the prosecution has failed to meet the requirements and the prerequisites of s. 32(1) of the Evidence Act and I accordingly rule that the statement tentatively marked as ID12 be refused as evidence for the prosecution.

It is quite obvious that the prosecution in this case tried to rely on the evidence of the missing witness by tendering his statement to the police to fortify its case against the accused person. With the exclusion of that evidence, the strength of the prosecution hinges on the evidence of SP10, one Chief Inspector Balakrishnan who on 30 August 2000 recorded a statement from the accused under s. 113 of the Criminal Procedure Code. The cautioned statement of the accused marked as P10 was admitted as evidence after the due process of trial within a trial was held to determine its admissibility. During the trial within a

trial eight witness were called by the prosecution while the accused and a doctor from the Teluk Intan Hospital gave evidence for the defence. It is alleged by the defence that the statement was involuntarily made as the accused was assaulted and threatened by the police in making the statement. The accused also claimed that he was forced to confess to the crime on the promise that he would soon be released from detention.

While giving evidence during the trial within a trial, Chief Inspector Balakrishnan (TSP1), the recording officer, testified that he does not know the accused and was never involved in the investigation of the case. Before recording the statement he ensured that they understand each other in the Tamil language and testified further that the accused voluntarily gave the statement. This witness also stated that he made a physical examination of the accused and found no injury whatsoever on his person. He administered the caution under s. 113 of the Criminal Procedure Code and explain it to the accused. The statement recorded from the accused was read back to him and he was given the opportunity to add or amend the statement. This witness categorically stated that he never force, induce, threaten or promise the accused anything in giving the statement to him. This witness also denied he ever assaulted the accused repeatedly with a steel ruler as suggested by the defence.

Three lock up guards namely TSP4, TSP5 and TSP7 testified during the trial within a trial giving details of the accused's movements from the lock up particularly on 30 August 2000 when the statement was recorded from the accused. All the three witnesses gave evidence that they observed no injury on the accused when going out or going back to the lock up on that day and neither did the accused complain of any injury or of the alleged assault to any of them.

TSP5 the arresting officer was called by the prosecution to deny the charges of assault committed by him on the accused while the accused was in the room of Chief Inspector Balakrishnan on the day of the recording of the statement. His evidence stated that he arrested the accused on 29 August 2000 and never at any time assaulted the accused. This evidence was corroborated by TSP2 who brought the accused from the lock up to Chief Inspector Balakrishnan's office and he stood guard outside while the accused was giving his statement to Chief Inspector Balakrishnan. TSP2 further testified that nobody else ever entered the room while the accused was giving his statement and he also testified that there was no injury on the accused person when he escorted the accused to and from the recording officer's room on 30 August 2000.

The accused gave evidence and stated that he gave a statement to the police not on 30 August 2000 but on 3 or 4 September 2000 and he was assaulted by TSP5 with a 2 1/2 ft long iron rod. He also claimed he was assaulted by Chief Inspector Balakrishnan and the same also threatened him to make the statement. On 7 September 2000 he was brought to the hospital and complain of fever and pains after being assaulted. TSP8, one Dr. James Kennedy who was attached to the Casualty Department of the Teluk Intan Hospital testified for the persecution that he examined the accused on 7 September 2000 and found that the accused was having fever, cough and cold. He found no physical injury on the accused and all his other organs were also found to be normal and he prescribed some medication to the accused for the fever, cough and cold.

The accused claimed that he was hit three times with an iron rod by TSP5 and he was also punched on his stomach, chest and waist by the same. He claims that he does not know how to read and write and that the content of P10 was never read to him He admitted seeing Chief Inspector Balakrishnan on 30 August 2000 but no statement was recorded on that day and the Chief Inspector told him that he would see him in two days time. The defence also called TSP2, Dr. Norlaila also from the Teluk Intan Hospital who prepared a medical report on the accused dated 26 March 2003. This report was however never tendered because of objection by the prosecution on the ground of hearsay. This witness also testified that she did have a look at the accused's outpatient card for 7 September 2000 and stated that there was no record to show the accused having cold and no prescription of any medication for cold was made. She however noted urinary tract infection was recorded on the same and it was done by Dr. James Kennedy. No evidence of any injury on the accused was elicited from this witness.

The court took time to consider the evidence adduced during the trial within the trial and after having considered the submission of both parties, ruled that the cautioned statement made by the accused on 30 August 2000 was voluntarily made and accepted as evidence after having marked the same as exh. P10. Having considered the evidence of the witnesses both for the prosecution and the defence, I am satisfied that the recording of the statement by TSP1 was done in accordance with the established norms and standard. I am satisfied that the accused has been given the free choice of whether or not he intends to give a statement to the recording officer. The accused was, at the end of the recording of the statement given the opportunity to add or amend his statement and this is evident by the signatures of the accused appearing in P10. TSP1 in his evidence also stated that before recording the statement he did interview the accused as to satisfy himself whether they could understand

each other before his administers the caution. It is not expected of the recording officer to state and write everything as regard the preliminaries to the recording. The law requires that the caution be administered to the accused and that it is understood by him. The understanding of the caution is very important and as observed by Chong Siew Fai J in the case of *PP v. Aidil b. Manaf* [1992] 2 CLJ 1239; [1992] 3 CLJ (Rep) 317, the accused must understand the caution. Even if the caution is not explained but if the accused understands it, it would not be fatal to the case. His lordship observed:

> It cannot be disputed that explaining the caution to an accused is good and recommendable practice. In this regard, I respectfully agree with the sentiments expressed in *PP v. Law Say Seek & Ors.* [1971] 1 MLJ 199 and *PP v. Mohd Fuzi b. Wan Teh & Anor*. [1989] 2 CLJ 652. It would be a good thing if procedures are standardised and steps taken to ensure that all recording officers follow the procedures.
>
> However, in the instant case so far, even assuming (but without deciding) that the caution was not explained, it is my opinion that mere failure to do so does not, in itself, necessarily render a cautioned statement inadmissible in evidence. Much depends on the facts and circumstances of each case. The important consideration is that it must be ensured that the giver of the statement fully understands the caution. So far as the present proceedings go, there is evidence from the inspector and in ID21 that the accused understood the caution administered.

In any event it has also been held in *Mohd Yusof v. Public Prosecutor* [1983] 2 MLJ 167 that the words in the caution is self explanatory and easily understood. Be that as it may, the facts and circumstances of this case as disclosed from the evidence clearly indicate that the recording officer has sufficiently satisfied the court that he was not acting mechanically by just reading the caution to the accused (see *PP v. Mohd Fuzi b. Wan The* [1989] 2 CLJ 652; [1989] 2 CLJ (Rep) 341). The recording officer's evidence is unshaken and there is no reason for me not to accept it after undergoing vigorous cross examination by counsel for the accused.

On the allegation of assault committed by the recording officer (TSP1) and TSP5 who arrested the accused, it has not been proved as to what the injuries are that is suffered by the accused. It is only upon being cross examined by the learned Deputy Public Prosecutor that the accused said that he was assaulted by TSP on his back. Against the recording officer (TSP1) the accused merely states that:

> Cif Inspektor Balakrishnan pukul saya dengan pembaris semasa mengugut saya. Pembaris jenis besi.

As against TSP5 the accused said:

> Semasa saya di tangkap beliau ada bersama dan semasa saya berikan percakapan beramaran kepada Cif Inspektor Balakrishnan Sarjan Gana ini telah memukul saya dengan besi untuk beri percakapan kepada Cif. Inspektor Balakrishnan. Sarjan ini pukul saya di bilik Cif Inspektor Balakrishnan. Panjang besi adalah 2 1/2 kaki. Saya di pukul sebanyak tiga kali. Selain besi Sarjan Gana gunakan tangannya untuk menumbuk perut, dada dan pinggang saya.

Beside being a general allegation of assault, I found that the evidence adduced by the prosecution clearly rebuts the allegation of assault by the accused. Not only the evidence of TSP1 and TSP5, but other evidence such as the evidence of TSP2 who testified that when the recording of the statement was done in TSP's 1 room no one else was present in the room also rebuts such allegation. The evidence of the lock up personnel also indicate that no injuries were ever noticed on the accused when he was brought back to the lock up on the day of the recording of the statement. The medical evidence from Dr. James Kennedy for the prosecution and Dr. Norlaila for the defence do not indicate any injury as ever being detected on the accused when he was brought for medical examination. The accused was brought in and out of the lockup a number of times and on each occasion a physical examination on his body was done by the lock up personnel and no injury whatsoever was ever detected on the accused. As for the accused himself, no complaint of any injury was ever made to any body throughout the duration of his stay at the lock up.

Learned counsel for the accused has also raised the issue of the presence of markings B2 and B3 against some names mentioned in the cautioned statement and submitted that P10 is not a statement of the accused but that it was made as a result of information given by a person named Eddy, marked as B3 in the statement. The prosecution sought to explain this through the evidence of the recording officer who stated that he left a bracket after those names in the cautioned statement for purposes of identification and that the markings B2 and B3 were never made by him. Explanation was further given by the evidence of the investigating officer (SP14) who admitted making those markings when the persons named Eddy and Saravanan were subsequently arrested in connection with the case. In my view, the markings B2 and B3 made by the investigating officer against the names mentioned in the cautioned statement does not affect the authenticity of the statement. I am satisfied beyond reasonable doubt as to its authenticity and I hold that by adding those markings B2 and B3, the investigating officer does not tamper with the document as to affect its authenticity. The addition of the markings B2 and B3 does not in my judgment alter the content and the substance of the statement.

From the evidence adduced during the trial within a trial, I am also satisfied that the cautioned statement P10 was recorded on 30 August 2000 and not on 3 September 2000 or 4 September 2000 as contended by the defence. The evidence of the recording officer has been corroborated by the other prosecution witnesses in the trial with a trial especially that of TSP2 and TSP5. The evidence by the prosecution and as well as by the accused clearly indicate that after being produced before the Magistrate in the morning of 30 August 2000, the accused was brought to Chief Inspector Balakrishnan's room for the recording of his cautioned statement. The accused however stated in his evidence that although he was brought to see Chief Inspector Balakrishnan on that day, no statement was given by him on that day and Chief Inspector Balakrishnan told him to come two days later. The accused also stated he was at D9, where Chief Inspector Balakrishnan was, between 2pm to 5pm on 30 August 2000. The accused stated that his statement was recorded either on 3 or 4 September 2000. The evidence of TSP6 L/Kpl Abdul Rahim b. Ali and TSP7 L/Kpl Norzailan b. Jonit however indicated that the accused was brought out of the lock up on 30 August 2000 at 8.15am and brought back at 3.20pm on the same day. This; is corroborated by exh. P11, the lock up diary which shows the entry recorded on the movement of the accused on 30 August 2000, among others. I found the evidence of the accused person on this issue to be incoherent and being disproved by the evidence of the prosecution. In its totality I found the evidence of the prosecution to be sufficient to prove that the cautioned statement of the accused was made on 30 August 2000.

Apart from the above, counsel for the accused has also urged me to consider the fact that the accused was not given lunch and that he was only given food when he was brought back to the lock up at 5pm on the day when the cautioned statement was recorded. I have earlier ruled that the statement of the accused was recorded on 30 August 2000 and the evidence clearly shows that he was brought back to the lock up at 3.20pm as indicated in the lock up dairy exh. P11. The evidence of the lock up personnel TSP4, TSP6 and TSP7 on the procedure relating to the movement of inmates to and from the lock up and the provision of food to the detainees has to be considered. In the instant case it is established that the accused was provided with food by TSP7 the moment he was brought back to the lock up at 3.20pm on 30 August 2000 in accordance with the standard procedure. Having considered the facts and circumstances of the case, although I agree that the accused has not had his lunch at the time of the recording of the statement, I do not think that it was so unreasonable for him to have his lunch only when he was brought back to the lock up at 3.20pm. As such, I do not think that the accused has shown any suspicious circumstances surrounding the making of the cautioned statement (see *Chan Ming Cheng v. PP* [2002] 4 CLJ 77) by the mere fact that he had a late lunch on that day.

It is trite law that there is no onus on the accused person to show involuntariness in the making of the cautioned statement but for the prosecution to prove beyond reasonable doubt that it was made voluntarily (see: *Hasibullah b. Mohd. Ghazali v. PP* [1993] 4 CLJ 535, *PP v. Tay Bee Seng* [1993] 1 CLJ 526, *Chan Ming Cheng v. PP* [2002] 4 CLJ 77). It is also not necessary for the defence to establish conclusively that there was inducement or threat. It is sufficient if the circumstances afford reasonable ground for beleiving that there was such a threat or inducement. Such inference may be suggested by the evidence produced by the accused or the sorrounding circumstances which I found none in the instant case. (See *PP v. Aris b. Yunus* [1989] 1 CLJ 239; [1989] 2 CLJ (Rep) 289).

As stated by Gopal Sri Ram JCA in *Juraimi Husin v. Public Prosecutor* [1998] 2 CLJ 383 at p. 408:

> The only burden that rests upon an accused is to place before the judge such facts as raise a well-grounded suspicion that the statement was made involuntarily.

And in *Francis Anthonysamy v. PP* [2003] 1 CLJ 831, the Court of Appeal held that there is nothing in s. 113 that calls for the recording officer to be satisfied that a statement was being made voluntarily before recording it and the legislature by the terms of the language employed has left the determination of the question of voluntariness to the court and not to the recording officer. I am satisfied beyond reasonable doubt that the prosecution has proved the cautioned statement of the accused person in this case was voluntarily made and hence exh. P10 was admitted as evidence.

At the end of the prosecution case, I ruled that there is no *prima facie* case against the accused Saravanan a/l Ayavoo in case No. PCT 45-03-02. I find there is not an ioata of evidence which may link him to the crime for which he was charged. However in respect of the accused person Mogan a/l Ayavoo in case No. PCT 45-24-2001 I ruled that the prosecution has made a *prima facie* case against him and accordingly called for the defence. In so doing, I am reminded of a passage from the judgment of Vincent J in *Public Prosecutor v. Saare Hama & Anor* [2001] 4 CLJ 475 where at p. 483-484 his lordship has the following to say:

> In my view the prosecution would be ruled to have 'made out a *prima facie* case against the accused' where the probative force of the evidence on all the essential elements in the charge taken as a whole is such that, if unrebutted, it is sufficient to make the Court to believe in the existence of the facts pertaining to such essential elements or to consider its existence so probable that a prudent man ought to act upon the supposition that those facts existed or did happen. It is therefore wrong for a judge or magistrate to require the

prosecution to prove that the accused is actually guilty beyond reasonable doubt before calling for his defence. That requirement for ultimate decision must be postponed until the end of the trial, and, to reiterate, there is no duty cast on the prosecution to actually prove their case beyond reasonable doubt as to the guilt of the accused at the close of the case for the prosecution.

Echoing the same, the court of appeal in *Public Prosecutor v. Dato' Seri Anuar Ibrahim (No. 3)* [1999] 2 CLJ 215, observed the following:

A *prima facie* case arises when the evidence in favour of a party is sufficiently strong for the opposing party to be called on answer. The evidence adduced must be such that it can be overthrown only by rebutting evidence by the other side. Taken in its totality, the force of the evidence must be such that if unrebutted, it is sufficient to induce the court to believe in the existence of the facts stated in the charge or to consider its existence so probable that a prudent man ought to act upon the supposition that those facts existed or did happen. As this exercise cannot be postponed to the end of the trial, a maximum evaluation of the credibility of witnesses must be done at the close of the case for the prosecution before the court can rule that a *prima facie* case has been made out in order to call for the defence.

I am fully aware of the fact that the evidence against the accused consists of the cautioned statement which he made to the police. From the cautioned statement the accused admits causing the injuries to the deceased and from the evidence given by the pathologist, the deceased suffered no less than fourteen injuries. All of the injuries except three of them are centered all around the neck of the deceased. The pathologist testified that the injury to the carotid artery which causes blood loss was the cause of death. In his cautioned statement the accused admitted slashing the deceased's neck using the broken beer bottle which he brought along with him. There is a clear admission in his cautioned statement that he caused those injuries when he said:

Saya sudah geram lalu saya kelar lehernya. Bapok terus jatuh pada tanah dan terus pegang kaki saya sebelah kanan. Saya tinggalkannya di situ.

In *PP v. Chong Boo See* [1988] 1 CLJ 679; [1988] 2 CLJ (Rep) 206 is was held that it is possible to convict a person on his confession standing alone provided the court is of the opinion that the incriminating parts are true and in practice it always looks for corroboration. Earlier, in *PP v. Lai Peng Yuen & Ors* [1968] 1 MLJ 12 it has been stated that a confession by an accused person can be used against himself and if believed could lead to a conviction, but the rule of prudence requires that there should be independent corroboration.

Having seived the cautioned statement of the accused and the other evidence of the prosecution, I find sufficient corroboration of the matters stated therein. I have cautioned myself of the principle that the court should caution itself that confessions are not always true and that they must be checked in the light of the whole evidence on record to see whether such confession could cany a conviction (*Sandra Margaret Birch v. PP* [1978] 2 MLJ 72).

The evidence of the pathologist on the injuries suffered by the deceased clearly lends truth the accused's cautioned statement and corroborates what is admitted therein. The possibility of such injuries being caused by a sharp object such as a broken bottle was confirmed by the witness and the accused admitted causing the injuries using a broken bottle. A broken beer bottle was tendered by the prosecution as exh. P27A & B which were retrieved from the scene where the body of the deceased was found. The accused led the police to the recovery of the broken bottle.

The accused also admitted taking the personal belongings of the deceased namely a T shirt and a blue waist pouch. These items were subsequently seized by the police from the accused's house. A search list (P24) produced by the prosecution itemised the items seized and acknowledged by the accused. These items however were not produced as evidence and the prosecution has successfully explained it by the testimony of the investigating officer who has lodged a police report (P25) regarding the loss of those items in the course of his transfer to Alor Star. The evidence of the deceased's sister (SP7) also indicated that when she last saw the deceased, the deceased was having a blue waist pouch with him and wearing a pair of jeans. That the deceased was riding a bicycle when the accused first called him is also corroborated by the evidence of the deceased's sister who had testified that when the deceased left the house that evening he was riding a bicycle. That the accused admitted slashing the deceased's chest and neck is sufficiently corroborated by the pathologist's evidence on his finding of a stab wound on the centre of the deceased's upper chest and abrasions on the medial part of the right nipple of the deceased and the multiple injuries comprising of both incised wounds and stab wounds on the neck. These facts are all mentioned and admitted by the accused in his cautioned statement. These evidence taken in its totality corroborates and points to the truth of the accused statement.

On the identity of the deceased, the court is sistified beyond reasonable doubt that the body found in the oil palm plantation was that of the deceased person. The evidence of SP8 and SP9 together with the evidence of the investigating officer (SP14) through the identification of the thumb print which was analysed using the AFIS (Automated Fingerprint Identification System) has sufficiently

proved the identity of the deceased. The father of the deceased, (SP6) who has testified that although he could not recognize the body, he stated that from the build and the overlapping upper teeth it was recognizable and he stood firm during cross examination that the body found was that of his son.

Although the accused admitted in his cautioned statement to have caused only two injuries to the deceased, the medical evidence shows otherwise. There were fourteen injuries caused on the deceased and the fatal injury is on the neck which is admitted by the accused in his statement. Having considered the sorrounding facts and circumstances, I draw the inference that the intention to cause those injuries is clearly manifested. There is premeditation on the part of the accused which can be inferred from the sorrounding circumstances of the case. The accused admitted taking the deceased on his motorcycle and along with him he brought a broken beer bottle which was placed in the basket of his motorcycle. The broken beer bottle was used to slash the neck of the deceased. The accused also admitted that he was angry with the deceased when he was slapped by the deceased earlier. From these sets of facts it would be reasonable to infer that the accused was intent of using the broken bottle to cause injuries to the deceased. The number of injuries caused to the deceased as evident from the pathologist's evidence further supports and justifies the inference of intention to commit the crime for which he stands charged. I am sastisfied that the accused has caused the injuries to the deceased with intention and such injuries were sufficient in the ordinary course of nature to cause death.

On the totality of those evidence and applying the test I have adumbrated earlier, I hold that the prosecution has established a *prima facie* case against the accused and accordingly the accused was called to make his defence. To reiterate, Mohamad Azmi FCJ in *Tan Boon Kean v. Public Persecutor* [1995] 4 CLJ 456 quoting a passage from *PP v. Chin Yoke* [1940] MLJ 47 states:

> A litigating party is said to have a *prima facie* case when the evidence in his favour is sufficiently strong for his opponent to be called on to answer it. A *prima facie* case, then, is one which is established by sufficient evidence and can be overthrown only by rebutting evidence adduced by the other side.

And further down, his lordship observed:

> *Prima facie*, means on the face of it or at first glance. So a *prima facie* case is a case which is sufficient to call for an answer. While *prima facie* evidence is evidence which is sufficient to establish a fact in the absence of any evidence to the contrary, but is not conclusive, (see the *Oxford Comparison the Law* at p. 87). '*Prima facie* evidence' is evidence where 'a party's evidence in support of any issue in his favour in the absence of further evidence' (see *Cross on Evidence* (2nd edn) at pp. 24 and 25, and also per Wee Chong Jin

CJ in *Gan Soo Swee a Anor v. Ramoo* [1969] 1 MLJ 59 at P 61). In our view, under s. 180 a *prima facie* case is one which is established by sufficient beyond reasonable doubt evidence and can be overthrown only by rebutting evidence adduced by the other side, so as to cast a reasonable doubt on the prosecution case as to the guilt of the accused.

The three alternatives were explained to the accused and he chose to make a statement from the dock.

In this statement from the dock, the accused stated that the cautioned statement was not made by him. However he said that he was assaulted by the police to give that statement. He was asked to sign it and he did so. On 11 August 2000 together with two others he went to have a drink in Langkap and after that they all went back home. Subsequently on a date which he cannot remember he said he was arrested by the police in connection with a murder case. The accused immediately corrected himself and stated that he was arrested by the police regarding a case which he did not know. He was brought to the Balai Polis Langkap where he was told to sit down with his head facing downwards. At that point of time he saw Eddy pointing towards him from the police lock up and it was after this that he was informed by the police that he was arrested in connection with a murder case but was never told where the offence was committed and the person killed. Neither was he told whether the deceased was a Malay or a Indian. He denied committing the offence and further denied to have anything to do with the case.

After the accused has given his statement from the dock, counsel for the accused made an application to recall SP14 the investigating officer to further cross examine him on the arrest of the missing witness whose statement under s. 112 of the CPC has earlier been refused by the court. The defence is trying to show that the crime was committed by this person and the cautioned statement of the accused was based on information given by this witness. In the interest of justice the court allowed the application. The further evidence of SP14 does not in anyway affect the prosecution case and neither does it fortify the case for the defence. SP14 maintains his evidence that the accused was arrested on 29 August 2000 and his cautioned statement was recorded on 30 August 2000 while the missing witness Rubin b. Jaibit was arrested on 10 September 2000. The arrest of Rubin b. Jaibit by SP14 on 10 September 2000 was made after his statement under s. 112 of the Criminal Procedure Code was recorded by SP11 on 9 September 2000. On that basis alone I do not see how it can be suggested that the cautioned statement of the accused was made based on the information given by the said Rubin b. Jaibit and that the accused merely signed the statement as directed by the police. I hold that the further evidence of SP14 has not cast any reasonable doubt on the prosecution's case.

It is trite that whether the accused testifies or adopts other means is a matter of choice for him and his counsel. No adverse inferences can be drawn or seen to be drawn only because he exercise his liberty to choose any particular course. (See: *Pang Chee Meng v. Public Prosecutor* [1992] 1 CLJ 39; [1992] 1 CLJ (Rep) 137). In *Mohamad Salleh v. Public Prosecutor* [1969] 1 MLJ 104 Wee Chong Jin CJ at p. 105 stated:

> In our judgment, the right of an accused at his trial on a criminal charge to make an unsworn statement from the dock is not a procedural right but a substantive right of an accused and accordingly does not depend on whether or not there is a specific provision for it in the Criminal Procedure Code. It seems to us beyond doubt that under our system of administration of justice, and it has been so throughout the entire history of our courts, a person accused of a criminal offence before an established court of justice has at his trial, as part of his defence, the right to make an unsworn statement from the dock if he wishes to do so. In our view this right can be taken away only by an express statutory provision to that effect.

Having considered carefully the story of the accused given from the dock, I find that the defence has failed to cast any doubt on the prosecution's case. It is not for the defence to prove anything and all that is required of it is to tender an explanation that is reasonable and probable and which cast a doubt either as to the truth of the prosecution's case or as to the guilt of the accused. As stated by Syed Agil Barakabah J in *Mohd Yusof b. Hj. Ahmed v. PP* [1963] 2 MLJ 167:

> The element of truth is required but the element of probability is the main factor so that if the court accepts the defence story as probable even though it is not convinced of the truth, then the defence has succeeded proving to the contrary the presumption that has arisen.

A reasonable doubt must be a doubt arising from the evidence or want of evidence and cannot be an imaginary doubt or conjecture unrelated to evidence. (*PP v. Saimin & Ors* [1971] 1 MLJ 16). Proof beyond reasonable doubt does not mean proof beyond the shadow of doubt. The degree of proof is well settled. It need not reach certainty, but it must carry a high degree of probability. (*Liew Kaling and Ors v. Public Prosecutor* [1960] 26 MLJ 306.

Having scrutinised the evidence of the defence, I find that what the accused stated in his statement from the dock is more of a bare denial of the whole episode. He disclaims any knowledge of the offence for which he is charged and denies that he ever made the cautioned statement to the police. Instead he stated that he was merely asked to sign the statement. A mere denial without other proof to reasonably lodge the prosecution evidence is not sufficient. (*PP*

v. Ling Tee Huah [1982] 2 MLJ 124, *PP v. Ku Lip See* [1981] 1 MLJ 258 and *Pendakwa Raya lw. Amran b. Ismail* [1992] 2 CLJ 787; [1992] 1 CLJ (Rep) 558). I further find that the statement of the accused made from the dock differs with his evidence during the trial within a trial in a very material aspect on the issue of whether or not he did give a statement to Chief Inspector Balakrishnan. On the alleged assault by the TSP5 he said:

> Semasa saya di tangkap beliau ada bersama dan semasa saya berikan percakapan beramaran kepada Cif Inspektor Balakrishnan, Sarjan Gana ini telah memukul saya dengan besi untuk beri percakapan kepada Cif Inspektor Balakrishnan.

His evidence clearly admits that he did make a statement. Again, during the trial within a trial the accused maintains that the cautioned statement was not made on 30 August 2000 but two or three days later, roughly either on 3 September 2000 or 4 September 2000. But in his statement from the dock he denies everything. There appears to be a glaring discrepancy in the evidence given by the accused during the trial within a trial and the evidence which he now gives from the dock. The accused is not a witness of truth. In the circumstances, I find that the accused's story has not cast a reasonable doubt on the prosecution's case and I accordingly find him guilty as charged and convict him. As to sentence, the accused shall face the sentence of death.